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The Death Penalty: An Abridged Look at Capital Punishment Legislation in the 109th Congress

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Summary

The USA PATRIOT Improvement and Reauthorization Act (Reauthorization Act), P.L. 109-177, 120 Stat. 192 (2006) contains a number of death penalty related provisions. Some create new federal capital offenses making certain death-resulting maritime offenses punishable by death. Some add the death penalty as a sentencing option in the case of pre-existing federal crimes such those outlawing attacks on mass transit. Some make procedural alterations such as those governing federal habeas corpus provisions for state death row petitioners. Other proposals offered during the 109th Congress followed the same pattern: some new crimes; some new penalties for old crimes; and some procedural adjustments. Other than the Adam Walsh Child Protection and Safety Act, P.L. 109-248, 120 Stat. 587 (2006), none of the other proposals were enacted, although one House or the other approved several. Among these, H.R. 1279 would have amended the venue provision for capital cases and made it a federal capital offense to use the facilities of interstate commerce to commit multiple murders and another to commit murder during and in relation to a drug trafficking offense. As would have H.R. 4472. H.R. 1751 and H.R. 4472 would have made it a federal capital offense to murder a federally funded public safety officer. H.R. 3132 would have created special expedited habeas review of state child murder cases. And S. 2611 would have made murder committed during the course of certain federal offenses a capital offense.

Of the capital proposals pending at adjournment, H.R. 4923 and S. 122 would have abolished the death penalty as a federal sentencing alternative and H.R. 379 would have imposed a moratorium barring the states from imposing or carrying out the death penalty.

This is an abridged version of CRS Report RL33395, *The Death Penalty: Capital Punishment Legislation in the 109th Congress*, by Charles Doyle, without the footnotes, appendices, or most of the citations to authority found in the longer report.

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Procedural Adjustments

The Reauthorization Act changes procedures associated with federal capital cases including those relating to air piracy cases arising before 1994 and habeas procedures for state capital petitioners.

Pre-1994 Capital Air Piracy Cases

In the early 1970s, the U.S. Supreme Court held unconstitutional the imposition of capital punishment under the procedures then employed by the federal government and most of the states. In 1974, Congress established a revised procedure for imposition of the death penalty in certain air piracy cases. In 1994, when Congress made the procedural adjustments necessary to revive the death penalty as a sentencing option for other federal capital offenses, it replaced the air piracy procedures with those of the new regime. At least one court, however, held that the new procedures could not be applied retroactively to air piracy cases occurring after the 1974 fix but before the 1994 legislation, in the absence of an explicit statutory provision. The Reauthorization Act adds an explicit provision to the end of the 1994 legislation. H.R. 1763 and H.R. 3060 contain comparable provisions.

Habeas Corpus in State Capital Cases

Federal law provides expedited habeas corpus procedures for state death row inmates in those states that qualify for application of the procedures and have opted to take advantage of them. As of enactment of the Reauthorization Act apparently, few if any states had sought and been found qualified to opt in. Under the Reauthorization Act, states opt-in or have opted-in as of the date, past or present, upon which the Attorney General determines they established or have established qualifying assistance of counsel mechanism. The earlier provision required that the mechanism include competency standards for appointed counsel. The Reauthorization Act removed the requirement, but granted the Attorney General regulatory authority sufficient to establish such standards. The act establishes a *de novo* standard of review for the Attorney General's determination before the D.C. Circuit. The Streamlined Procedures Acts in the House and Senate, H.R. 3035 and S. 1088, would make similar changes in the opt in procedure.

S. 956, H.R. 2388, and *H.R. 3132* (House-passed legislation is noted in italics), contain a common amendment governing federal habeas cases of an individual convicted under state law of killing a child, proposed 28 U.S.C. 2254. Habeas under section 2254 would have been unavailable in such cases except for claims that both (1) relied on a new constitutional interpretation made retroactively applicable by the Supreme Court or on evidence that the petitioner could not reasonable have been previously discovered and (2) were predicated upon facts in the face of which no reasonable judge or jury would have found the petitioner guilty but for the constitutional error, proposed 28 U.S.C. 2254(j)(1), (2). Under the bills, judicial consideration of claims that meet the dual criterion would have been expedited.

Additional Procedural Proposals: Venue

Several anti-gang bills purport to change the place where capital cases may be tried. S. 155, H.R. 970, *H.R. 1279*, and *H.R. 4472* contain the same provision that would have rewritten 18 U.S.C. 3235. Section 3235 provides that where possible capital cases should be tried in the county in which the crime occurred. The proposal would have repealed the "county trial" language of section 3235 and replaced it with language reminiscent of the multi-district terms of section 3237(a): "(a) the trial of any offense punishable by death shall be held in the district where the offense was committed or in any district in which the offense began, continued, or was completed. (b) If the offense, or related conduct, under subsection (a) involves activities which

affect interstate or foreign commerce, or the importation of an object or person into the United States, such offense may be prosecuted in any district in which those activities occurred," proposed 18 U.S.C. 3235. The proposal would have operated subject to two constitutional provisions and two Supreme Court cases which construe them.

Mitigating and Aggravating Factors

The death penalty may be imposed in a federal capital case only after consideration of the mitigating and aggravating factors listed in 18 U.S.C. 3592 and only if at least one aggravating factor is found. Several bills would have adjusted the factors. One of the aggravating factors in homicide cases consists of the fact that the death resulted from the commission of a list of designated felonies. The Adam Walsh Child Protection and Safety Act adds 18 U.S.C. 2245 to the list, 18 U.S.C. 3591(c)(1). Among the proposals that failed to secure final passage, H.R. 3860 would have added 18 U.S.C. 2245 (sexual abuse resulting in death) to the list, proposed 18 U.S.C. 3591(c)(1). H.R. 3060 would have placed 18 U.S.C. 2339D (receipt of military training from a foreign terrorist organization) on the list, and H.R. 5040 would have done the same and also added 18 U.S.C. 241 (civil rights conspiracy), 245 (deprivation of federally protected activities), 247 (interference with religious exercise), 1512 (tampering with federal witnesses), and 1513 (retaliating against federal witnesses), proposed 18 U.S.C. 3592(c)(1). Both H.R. 3060 and H.R. 5040 would have made obstruction of justice an aggravating factor in homicide cases, proposed 18 U.S.C. 3592(c)(17).

Other Procedural Proposals

H.R. 3060 would have allowed the court *upon a finding of good cause* or agreement of the parties to proceed with a capital sentencing jury of fewer than 12 members, proposed 18 U.S.C. 3593(b). Existing law requires agreement of the parties. The bill also amends Rule 24(c) of the Federal Rules of Criminal Procedure to allow for the selection of a maximum of 9 alternate jurors and allows each side 4 peremptory alternate juror challenges when either 7, 8, or 9 alternates are to be selected, proposed F.R.Crim.P. 24(c). The present Rule calls for a maximum of 6 alternates and affords the parties 3 alternate juror peremptory challenges. These and other similar proposals passed the House initially as part of H.R. 3199, but were dropped in conference and were not part of the Reauthorization Act as passed.

H.R. 5040 would have struck the provision which outlaws the execution of the mentally retarded, proposed 18 U.S.C. 3596(c). The omission, although perhaps surprising to some, appeared inconsequential since execution of the mentally retarded is constitutionally proscribed. The bill also would have required notice to the government and would have permitted the government to request an independent mental health examination when a defendant intends to enter mental retardation as a mitigating factor for capital sentencing purposes, proposed 18 U.S.C. 3593(b). The existing statute mentions no such requirements. Presumably recourse to the proposed procedure would have been more infrequent in those cases where the district court conducted a pre-trial evidentiary hearing to determine whether the mental retardation of the accused precluded imposition of the death penalty following any conviction. Present law permits a capital jury to unanimously recommend a sentence of death or of imprisonment without possibility of release; if they do not, the court is to sentence the defendant to any lesser sentence authorized by law, i.e., imprisonment for life or a term of years. H.R. 5040 would have provided that if the jury cannot agree on a capital recommendation, a new sentencing jury would have been empanelled and the issue retried, proposed 18 U.S.C. 3594. Existing law specifically contemplates that the execution of federal capital sentences will be carried out in state facilities. H.R. 5040 would have granted the Attorney General regulatory implementing authority without exclusive reference to state

facilities, proposed 18 U.S.C. 3596, 3597. The bill also would have rewritten 18 U.S.C. 3005 which assures defendants two assigned counsel in capital cases. The proposal would have made it clear that the statute only applied when the government sought the death penalty and not in capital cases where it had elected not to do so, proposed 18 U.S.C. 3005(a). The federal appellate courts are divided on the question over whether section 3005 now entitles a defendant to the assistance of two attorneys in all capital cases or only in those in which the government actively seeks the death penalty. The proposal also would have explicitly authorized the government to strike for cause potential jurors in capital cases whose opposition to the death penalty "would prevent or substantially impair the performance" of their duties as jurors, proposed 18 U.S.C. 3005(b). The proposal borrowed language from Supreme Court cases indicating that a potential juror may be struck if his views on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

New Federal Capital Offenses

Title III of the Reauthorization Act, designated the Reducing Crime and Terrorism at America's Seaports Act, creates three new federal capital offenses: (1) 18 U.S.C. 2282A (devices or dangerous substances in waters of the United States likely to destroy or damage ships or to interfere with maritime; causing a death); (2) 18 U.S.C. 2283 (transportation of explosive, biological, chemical, or radioactive or nuclear materials; causing a death); and 18 U.S.C. 2291 (destruction of vessel or maritime facility; intentionally causing a death). Two other port security bills would have suggested similar new death penalty offenses, H.R. 2651 and S. 378 (as reported) (proposed 18 U.S.C. 2282A, 2283, and 2291), and a third would have offered three slightly less comparable offenses, H.R. 173 (proposed 18 U.S.C. 1372 (destruction of vessel or maritime facility; if death results), 2280A (devices or substances in waters of the United States likely to destroy or damage ships; if death results), and 2282 (malicious dumping; if death results)).

The bills drafted to counter gang violence—*H.R. 4472*, *H.R. 1279*, H.R. 970, and S. 155—frequently include two new federal death penalty offenses. One of the proposed offenses would have proscribed the use of interstate facilities with the intent to commit multiple murders and would have been a capital offense where death results. The other, modeled after the provision that condemns the use of a firearm during or in relation to a crime of violence or a drug offense, would have outlawed crimes of violence committed during or in relation to a drug trafficking offense and makes the offense punishable by death if a death results. A few other bills would have made it a federal capital offense to kill a police officer under various circumstances. For example, H.R. 2363 would have outlawed killing a peace officer and fleeing the country, proposed 18 U.S.C. 1121(c). *H.R. 1751* and H.R. 2194 would have prohibited murdering federally funded state or local law enforcement officers, proposed 18 U.S.C. 1123.

Other proposed new federal capital offenses would have included (1) agroterrorism when death results, proposed 18 U.S.C. 2339D (S. 1532); (2) interference with federal disaster relief efforts if death results, proposed 18 U.S.C. 1370 (H.R. 3728); (3) death resulting from a violation of 18 U.S.C. 1590 (trafficking in persons) that involves raping or kidnapping more than one person, proposed 18 U.S.C. 1590 (S. 2437); (4) death resulting from a violation of proposed 18 U.S.C. 555 (*S. 2611*) that would have proscribed evading immigration, customs or agricultural inspection at the border; and (5) death resulting from the commission of federal crimes of terrorism, violations of 18 U.S.C. 175 (biological weapons), 175b (biological materials), 229 (chemical weapons), 831 (nuclear materials), or of 42 U.S.C. 2284 (atomic weapons), or conspiracies or attempts to commit such crimes or violations, proposed 18 U.S.C. 2339E (H.R. 3060, H.R. 5939, S. 3882, S. 3848).

Capital Punishment for Violation of Existing Crimes

Section 110 of the Reauthorization Act merges 18 U.S.C. 1992 (2000 ed.) (wrecking trains) and 18 U.S.C. 1993 (2000 ed.) (attacks on mass transit) into a new 18 U.S.C. 1992. The train wreck offense was a capital offense; the mass transit offense was not; under the new section both are now capital offenses, 18 U.S.C. 1992.

The most common example of a proposed death penalty sentencing option for an existing crime comes from some of the child safety bills, many of which would have made the death penalty available where a child dies as a result the commission of a federal crime of violence or some other federal crime: (1) S. 956 (crime of violence, proposed 18 U.S.C. 3559(d)); (2) H.R. 2388 (same); (3) *H.R. 3132*(same); (4) *H.R. 4472*(same); and (5) H.R. 3860 (violations of 18 U.S.C. ch.110 (sexual exploitation of children), ch. 117 transportation of illegal sexual activity), or 1591 (sex trafficking in children), proposed 18 U.S.C. 2245(b)). Congress adopted a variation of this theme in the Adam Walsh Child Protection and Safety Act when it amended 18 U.S.C. 2245 to make murder a federal capital offense when committed in the course of a wider range of federal child sexual abuse offenses.

The gang bills generally would have rewritten the federal criminal gang statute (18 U.S.C. 521) to permit imposition of capital punishment for a death-resulting violation of the newly crafted provisions or of the Travel Act (18 U.S.C. 1952): *H.R. 1279*, proposed 18 U.S.C. 521, 1952; S. 155, proposed 18 U.S.C. 523, 1952; *H.R. 4472*, proposed 18 U.S.C. 521, 1952; see also, H.R. 970, proposed 18 U.S.C. 523.

H.R. 3060, H.R. 5939, S. 2883, and S. 3848 would have made capital offenses of several death-resulting terrorism-related offenses that are now punishable by no more than life imprisonment, specifically, proposed 18 U.S.C. 832 (participating in foreign nuclear or other weapon of mass destruction programs), proposed 18 U.S.C. 2332g (anti-aircraft missiles), proposed 18 U.S.C. 2332h (radiological dispersal devices), proposed 18 U.S.C. 175c (smallpox virus), and proposed 18 U.S.C. 42 U.S.C. 2272 (atomic weapons). It is possible that the drafters of H.R. 3060 also intended to treat receipt of military training from a foreign terrorist organization, 18 U.S.C. 2339D, like treason and espionage; that is, to make it a capital offense even if no death results from commission of the offense. The statutes that outlaw treason and espionage make them punishable by death or a term of imprisonment, 18 U.S.C. 2381, 794. Section 3591(a)(1) of the federal capital punishment procedures provides that treason or espionage are punishable by death if execution is found justified after considering the mitigating and aggravating factors listed in section 3592. Section 3592(b) lists three aggravating factors for treason and espionage cases, i.e., (1) the offender has a prior espionage or treason conviction, (2) the offense involved a grave risk to national security, and (3) the offense involved a grave risk of death.

Violation of section 2339D is punishable by imprisonment for not more than 10 years, 18 U.S.C. 2339D(a). H.R. 3060 would have made no change in section 2339D, but it would have amended section 3591(a)(1) of the capital procedures provisions to say that violations of sections 2381 (treason), 794 (espionage), or 2339D (terrorist training) may be punished by death if execution is found justified after considering the mitigating and aggravating factors listed in section 3592, proposed 18 U.S.C. 3591(a)(1). It also would have amended the list of 3592(c) aggravating factors to add a fourth factor, i.e., the defense involved substantial planning by the defendant, proposed 18 U.S.C. 3592(c)(4). Assuming the conforming amendment to section 2339D—making it a capital offense—was an oversight and in spite of the proposal's caption ("addition of terrorism to death penalty offenses not resulting death"), it is not clear that the courts would permit imposition of the death penalty for a violation of section 2339D unless the offense also involved a first degree murder. The Eighth Amendment's cruel and unusual punishment clause precludes imposing the death penalty for the rape of an adult woman by an individual already under a sentence of life imprisonment at the time of the rape; it precludes imposition of the death penalty even in the case of murder unless the defendant at least acted intentionally or acted with reckless indifference to human life while participating in a felony involving a murder; and since the Court's decision in *Furman v. Georgia*, it has never been called upon to approve, and consequently has never approved, imposition of the death penalty for a crime that did not involve murder.

Moratorium

H.R. 4923/S. 122 would have repealed federal death penalty provisions and barred imposition or execution of any capital sentence for violation of federal law. It made no mention of capital punishment imposed for violation of state law. H.R. 379, on the other hand, would have set a ten year moratorium on imposition and execution of capital sentences in any state in which an individual originally sentenced to death had subsequently been judicially found innocent. It said nothing of capital punishment imposed or executed under federal law.

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